

of securities specified in paragraph (a) of this section, and

2. Paragraph (b) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (b) of this section.

[60 FR 6965, Feb. 6, 1995]

§ 230.139 Definition of “offer for sale” and “offer to sell” in sections 2(10) and 5(c) in relation to certain publications.

Where a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or which is a foreign private issuer meeting the conditions of paragraph (a)(2) of this section proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) relating to its securities, the publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to the registrant or any class of its securities shall not be deemed to constitute an offer for sale or offer to sell the securities registered or proposed to be registered for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of such securities, if the conditions of paragraph (a) or (b) of this section have been met:

(a)(1) The registrant meets the registrant requirements of Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter) and the minimum float or investment grade securities provisions of either paragraph (B) (1) or (2) of General Instruction I of the respective form and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business; or

(2) The registrant is a foreign private issuer that meets all the registrant requirements of Form F-3 (§239.33 of this chapter), other than the reporting history provisions of paragraphs A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I of such form, and the registrant's securities have been traded

for a period of at least 12 months on a designated offshore securities market, as defined in §230.902(a), and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business.

(b)(1) Such information, opinion or recommendation is contained in a publication which:

(i) Is distributed with reasonable regularity in the normal course of business and

(ii) Includes similar information, opinions or recommendations with respect to a substantial number of companies in the registrant's industry, or sub-industry, or contains a comprehensive list of securities currently recommend by such broker or dealer.

(2) Such information, opinion or recommendation is given no materially greater space or prominence in such publication than that given to other securities or registrants; and

(3) An opinion or recommendation as favorable or more favorable as to the registrant or any class of its securities was published by the broker or dealer in the last publication of such broker or dealer addressing the registrant or its securities prior to the commencement of participation in the distribution.

Instructions to Rule 139: 1. For purposes of paragraph (a), a research report has not been distributed with *reasonable regularity* if it contains information, an opinion, or a recommendation concerning a company with respect to which a broker or dealer currently is not publishing research.

2. Where projections of a registrant's sales or earnings are included, the publication must comply with the following in order to meet paragraphs (b)(1) and (b)(3).

A. The projections must have been published previously on a regular basis in order for the publication to meet paragraph (b)(1)(i);

B. The projections must be included with respect to either a substantial number of companies in the registrant's industry or sub-industry or all companies in a comprehensive list which is contained in the publication, and must cover the same periods with respect to such companies as with respect to the registrant, in order to meet the requirements of paragraph (b)(1)(ii); and

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C. Because projections constitute opinions within the meaning of the Rule, they must come within paragraph (b)(3).

[49 FR 37573, Sept. 25, 1984, as amended at 59 FR 21650, Apr. 26, 1994; 60 FR 6966, Feb. 6, 1995]

§ 230.140 Definition of “distribution” in section 2(11) for certain transactions.

A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of the securities of such issuer or affiliated issuers within the meaning of section 2(11) of the Act.

[24 FR 6386, Aug. 8, 1959]

§ 230.141 Definition of “commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commissions” in section 2(11), for certain transactions.

(a) The term *commission* in section 2(11) of the Act shall include such remuneration, commonly known as a spread, as may be received by a distributor or dealer as a consequence of reselling securities bought from an underwriter or dealer at a price below the offering price of such securities, where such resales afford the distributor or dealer a margin of profit not in excess of what is usual and customary in such transactions.

(b) The term *commission from an underwriter or dealer* in section 2(11) of the Act shall include commissions paid by an underwriter or dealer directly or indirectly controlling or controlled by, or under direct or indirect common control with the issuer.

(c) The term *usual and customary distributors’ or sellers’ commission* in section 2(11) of the Act shall mean a commission or remuneration, commonly known as a spread, paid to or received by any person selling securities either for his own account or for the account

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of others, which is not in excess of the amount usual and customary in the distribution and sale of issues of similar type and size; and not in excess of the amount allowed to other persons, if any, for comparable service in the distribution of the particular issue; but such term shall not include amounts paid to any person whose function is the management of the distribution of all or a substantial part of the particular issue, or who performs the functions normally performed by an underwriter or underwriting syndicate.

[2 FR 1075, May 26, 1937]

§ 230.142 Definition of “participates” and “participation,” as used in section 2(11), in relation to certain transactions.

(a) The terms *participates* and *participation* in section 2(11) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) shall not include the interest of a person (1) who is not in privity of contract with the issuer nor directly or indirectly controlling, controlled by, or under common control with, the issuer, and (2) who has no association with any principal underwriter of the securities being distributed, and (3) whose function in the distribution is confined to an undertaking to purchase all or some specified proportion of the securities remaining unsold after the lapse of some specified period of time, and (4) who purchases such securities for investment and not with a view to distribution.

(b) As used in this section:

(1) The term *issuer* shall have the meaning defined in section 2(4) (48 Stat. 74, 48 Stat. 905; 15 U.S.C. 77b) and in the last sentence of section 2(11).

(2) The term *association* shall include a relationship between two persons under which one:

(i) Is directly or indirectly controlling, controlled by, or under common control with, the other, or

(ii) Has, in common with the other, one or more partners, officers, directors, trustees, branch managers, or other persons occupying a similar status or performing similar functions, or

(iii) Has a participation, direct or indirect, in the profits of the other, or